89-138

No._____

IN THE

Supreme Court of the United States

October Term, 1989

TIMOTHY REINIG,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Questions Presented for Review

1) When the trial court told the jury that the petitioner had—as a matter of law—participated in the crime charged, were the petitioner's rights pursuant to the Sixth and Fourteenth Amendments of the United States Constitution violated?

2) Was the trial court compelled by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution to exclude statements which resulted from the functional equivalent of custodial police interrogation after the petitioner requested an attorney?

TABLE OF CONTENTS.*

* The caption of the case in this Court contains the names of all parties. *See* Rule 21.1(b) of the Rules of the Supreme Court of the United States.

Page

TABLE OF AUTHORITIES.

REPORTS OF OPINIONS BELOW.

The People of the State of New York v. Reinig, _____ A.D.2d _____, 537 N.Y.S.2d 709 (4th Dep't 1989), *leave denied*, _____ N.Y.2d _____, _____ N.Y.S.2d _____ (N.Y. May 29, 1989).

The People of the State of New York v. Reinig, No. 84-0458-001 (N.Y. County Ct. Erie County March 15, 1985), *aff'd in relevant part*, _____ A.D.2d _____, 537 N.Y.S.2d 709 (4th Dep't 1989), *leave denied*, _____ N.Y.2d _____, _____ N.Y.S.2d _____ (N.Y. May 29, 1989).

IN THE

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No._____

TIMOTHY REINIG,

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vs.

THE STATE OF NEW YORK,

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Jurisdictional Statement

The date of the judgment of the highest court of New York State sought to be reviewed is May 24, 1989. The date of entry is the same.

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. §1257.

Constitutional Provisions and Statutes

This case involves interpretation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution (set forth respectively in the following three paragraphs):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also refers to New York Criminal Procedure Law §60.22 (McKinney's 1981) and New York Penal Law §20.00 (McKinney's 1987):

> *§60.22. Rules of evidence; corroboration of accomplice testimony.*
>
> 1. A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.
>
> 2. An "accomplice" means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:
>
> (a) The offense charged; or
>
> (b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.
>
> 3. A witness who is an accomplice as defined in subdivision two is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy, immunity or previous prosecution, amounting to a collateral impediment to such a prosecution or conviction, not affecting the conclusion that such witness engaged in the conduct constituting the offense with the mental state required for the commission thereof.

§20.00. Criminal liability for conduct of another.

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

Statement of the Case

Timothy Reinig's defense at trial did not dispute that he and Charles Keller had been found in possession of items taken from the apartment of Margaret Oertlet. *See* Trial Transcript at 676. Rather, his defense centered around the contention that Mr. Keller burglarized the apartment and started the fire that took Ms. Oertlet's life, and that Mr. Reinig was simply helping Mr. Keller carry what Mr. Reinig thought were Mr. Keller's possessions when the two of them were arrested. *See generally id.* at 702-07. Because Mr. Keller admitted that he knew the victim, *id.* at 493-96, and that he had been seen by the victim on the night in question, *id.* at 514, and because there was no proof that Mr. Reinig had ever seen Ms. Oertlet, only Mr. Keller had any motive to commit the arson and murder. Mr. Reinig's defense was that he simply did not participate in the crimes charged.

But the jury was never permitted to reach this issue, because the trial court directed a verdict against Mr. Reinig on the question of his participation. The court told the jury that someone who aids and abets a criminal transaction is legally responsible for it, that such a person is called an accomplice and that Mr. Keller was Mr. Reinig's accomplice as a matter of law. *Id.* at 777. In so doing, the court unmistakably told the jury that they were required to accept the court's conclusion that Mr. Keller and Mr. Reinig both participated in the crimes charged. The charge thus robbed Mr. Reinig of the most basic right to have his guilt or innocence determined by a jury of his peers.

The Appellate Division of New York State Supreme Court affirmed Mr. Reinig's conviction because it found that the jury charge was a correct statement of New York law and "did not convey to the jury that defendant

was guilty ...."[1] The New York Court of Appeals declined further review. This petition for a writ of certiorari respectfully asks this Court to vindicate both Mr. Reinig's constitutional rights and its prior decisions precluding instructions like the ones at bar.

Likewise, this petition seeks review of the determination that statements attributed to Mr. Reinig could be introduced as part of the prosecution's case-in-chief. Despite the egregious nature of the facts, described more fully below in the argument section of this petition, the trial court and New York's appellate courts have refused to recognize that this Court's precedents require suppression of those statements.[2]

[1] No objection to this portion of the jury charge was raised at trial. However, in light of the fundamental nature of the error, it is respectfully submitted that no objection was necessary to preserve the issue for appellate review. *Cf. Rose v. Clark*, 478 U.S. 570, 578 (1986) (error that "the wrong entity judged the defendant guilty" can never be deemed harmless). This issue was first raised in appellant's initial brief on appeal. *See* Brief for Appellant at 8-11.

[2] As a result of the petitioner's pretrial federal constitutional challenges to these statements, the trial court conducted a pretrial hearing. *See* Pretrial Hearing Transcript. The trial court then refused to suppress the statements. *See* Appendix C. The petitioner continued his challenge on appeal. *See* Brief for Appellant at 17-18.

ARGUMENT

I. The court improperly directed the jury to find that Mr. Reinig participated in the crime charged, and thereby effectively directed a verdict against him.

Of the many errors committed during the course of Mr. Reinig's trial, the most egregious was the court's instruction that the jury was required to accept the court's determination, as a matter of law, that Timothy Reinig participated in the crimes charged. After first instructing the jury that an individual may be liable for the conduct of another under certain circumstances, the court stated that:

> In short, aiding and abetting another in the commission of a crime with the intent that the criminal purpose be effected, *makes the aider and abettor as equally responsible for the act as the one who actually committed it. Such a person who aids, abets or participates in the commission of a crime is considered an accomplice.* For your information, the term accomplice is defined by law means [sic] a witness and, in a criminal action, who, according to the evidence adduced in such action, may reasonably be considered to have participated in the offenses charged or offenses, based on the same, or some of the same facts or conditions which constitute the offenses charged. *Now, based on that definition, I have determined on the basis of the evidence in this case that Charles Keller is an accomplice as a matter of law. You are therefore required to accept my determination in that regard.* Trial Transcript at 777 (emphasis added).

It is beyond dispute that a criminal defendant "has the right to have a jury determine his guilt or innocence, and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." *Cabana v. Bullock,* 474 U.S. 376, 384 (1986) (citations omitted). Hence, because a presumption that a person intends the

ordinary consequences of his voluntary acts may permit a jury to convict a defendant without finding the requisite element of criminal intent, such a presumption is impermissible. *See Sandstrom v. Montana*, 442 U.S. 510, 514-24 (1979). Similarly, a charge that instructs the jury that the defendant participated with another individual in the commission of the crime charged, removes from the jury's consideration an essential element of that crime, *i.e.*, whether the defendant actually participated in it, and is therefore constitutionally impermissible. Moreover, while *Sandstrom* error may be harmless, effectively directing a verdict against the defendant can never be deemed harmless, no matter how overwhelming the evidence of guilt, because "the error in such a case is that the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986).

In the present case, it is clear that the court's instruction indeed directed the jury to find that the defendant participated in the crime charged. The court told the jury (1) that a person who aids and abets another is "as equally responsible for the act as the one *who actually committed it*" (emphasis added), (2) that a person who aids or abets is called an accomplice, and (3) that—as a matter of law—Charles Keller was an accomplice of the defendant with respect to the offenses charged. If Charles Keller was an accomplice, then under the court's instruction the defendant must have been the person "who actually committed" the crime. The court's instruction clearly had the effect of removing an essential element of the crime from the jury's consideration.

Such an error goes beyond the unconstitutional instruction condemned in *Sandstrom*. While in *Sandstrom*, the error simply involved a

presumption—applicable only if the jury first found certain threshold facts—that might color the jury's deliberations, in the present case the jury was actually told—as a matter of law—that the defendant was a criminally responsible participant in the crime charged. While in *Sandstrom*, the jurors "could reasonably have concluded that they were directed to find against defendant on the element of intent," 442 U.S. at 523, in the present case, the jurors were directed to find against the defendant on the very question of whether he actually participated in the crime charged.[3]

Indeed, the error in the present case is akin to the direction of a verdict against the defendant in a criminal case, a practice never permitted under the Constitution. As this Court noted in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977):

> [I]n a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused. (citations omitted).

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[3] The trial court apparently believed that New York evidentiary rules requiring corroboration of accomplice testimony required the definition of accomplice given here. *See* N.Y. Criminal Procedure Law §60.22 (McKinney's 1981). However, presumably to avoid the very error committed here, New York law does not refer to one who aids and abets as an "accomplice". *See* N.Y. Penal Law §20.00 (McKinney's 1987). In any event, even if the charge correctly stated New York law, it unconstitutionally directed the jury to find that the petitioner was a legally responsible participant in the crime charged.

This rule has its roots in the Sixth Amendment right to a jury trial. *See Rose v. Clark*, 478 U.S. 570, 578 (1986). Hence, whenever a trial court directs the jury to find an essential element against a criminal defendant, the charge violates the defendant's constitutional rights.

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Sandstrom*, 442 U.S. at 520 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). Because a reasonable juror could have concluded that the trial court found, as a matter of law, that the defendant participated with his accomplice in the crime charged, the court's instructions may well have resulted in the defendant's conviction without the jury finding every element of proof beyond a reasonable doubt.[4] This Court should grant a writ of certiorari to preserve Mr. Reinig's constitutional rights and the vitality of the rule precluding directed verdicts against defendants in criminal cases.

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[4] The standard which this Court should apply is whether the charge may have been understood by a reasonable juror as directing a finding that the petitioner participated in the crime charged. As this Court noted in *Sandstrom*:

> We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that the defendant came forward with 'some' evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid.

442 U.S. at 519.

II. Mr. Reinig's statements were admitted into evidence against him in violation of his privilege against self-incrimination and his right to counsel.

Both lawyers and laymen know that since the landmark decision of *Miranda v. Arizona*, 384 U.S. 436 (1966), custodial police questioning of suspects has been limited. The police may not question a suspect prior to informing him of his constitutional rights to remain silent and to have an attorney present. *See id.* Once a suspect tells police that he wants to see a lawyer, the police can conduct no custodial interrogation without an attorney being present. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Moreover, the term "interrogation" means more than simply questioning: as this Court has held, interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (footnote omitted); *see Brewer v. Williams*, 430 U.S. 387 (1977).

In the present case, the police officers who testified at trial conceded that they kept the petitioner at the scene of the crime for a period longer than is customary. *See* Trial Transcript at 224. Incredibly, one officer also admitted that he knew that an individual was more likely to make statements if he were kept at the scene of the crime. *Id.* Hence, it is beyond dispute that the action of the police in keeping Mr. Reinig at the scene constituted "actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *See Rhode Island v. Innis, supra.*

Moreover, the lower court found that statements admitted into evidence against Mr. Reinig were made by him after he requested an attorney. *See* Appendix C. Indeed, one police officer testified that upon being given his *Miranda* rights, the petitioner asked for an attorney and invoked his constitutional privilege to remain silent. *See Huntley* hearing transcript at 30-33. Moreover, another police officer testified that he heard a police officer make several "goading" or "teasing" remarks to the petitioner before the petitioner was advised of his rights under *Miranda*. *See* Trial Transcript at 232-35. Because these remarks were likewise the functional equivalent of custodial questioning, statements made by the petitioner in response should not have been admitted at trial.

Nevertheless, the trial court refused to exclude statements such as "I only do burglaries" and "I'll kill the boy if he lies on me", obviously made in response to the interrogation environment admittedly created by the police. In order to preserve both the constitutional rights of Timothy Reinig and the integrity of this Court's Fifth and Sixth Amendment decisions, it is respectfully submitted that a writ of certiorari should be granted and this issue should be considered on the merits.

Conclusion

It is respectfully requested that this Court grant the petition for a writ of certiorari in this case.

Dated: Buffalo, New York
July 20, 1989

Respectfully submitted,

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APPENDIX "A"

Certificate Denying Leave to Appeal by the State of New York Court of Appeals, entered May 24, 1989

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. FRITZ W. ALEXANDER, II,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

TIMOTHY REINIG,
Appellant.

CERTIFICATE DENYING LEAVE

I, FRITZ W. ALEXANDER, II, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
May 24, 1989

FRITZ W. ALEXANDER
Associate Judge

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* Description of Order: Order of the Appellate Division, Fourth Department, entered February 3, 1989, affirming a judgment of the Erie County Court, Erie County, entered July 12, 1985.

APPENDIX "B"

Order and Accompanying Memorandum of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, No. 1864, entered February 3, 1989

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

1864

PRESENT: DENMAN, J.P., BOOMER, PINE, DAVIS, JJ.

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

TIMOTHY REINIG,
Appellant.

The above named Timothy Reinig having appealed to this court from a judgment of the Erie County Court, entered in the Erie County Clerk's office on July 12, 1985 and said appeal having been argued by Lawrence Vilardo of counsel for appellant, Jo Faber of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed.

Memorandum, which is hereby made a part hereof.

Entered: February 3, 1989

CARMEN S. LEONE, *Clerk*

1864. (Erie Co.)—People of the State of New York, Respondent, v Timothy Reinig, Appellant.—Judgment unanimously affirmed. Memorandum: We find no error in the court's instructions to the jury. Moreover, defendant did not object to any portion of the court's charge and thus has not preserved his contentions for our review as a matter of law. The court's charge on accessorial conduct was correct, as was its charge on corroboration of the testimony of an accomplice. The court did not err in charging that the main prosecution witness was an accomplice as a matter of law because, from his own testimony, he "may reasonably be considered to have participated in the offense charged" (CPL 60.22[2][a]). Under the circumstances of this case, a failure to so charge would have been error (*see*, People v Jenner, 29 NY2d 695). The instruction did not convey to the jury that defendant was guilty of the offense charged. "Assuming, *arguendo* that the trial court's definition of accomplice and its charge that witness [Keller] was an accomplice as a matter of law could have been understood as determining that defendant participated in the crime charged, the court's subsequent instruction on the limited use of accomplice testimony in the jury's determination acted to dispel any misconception the jury may have had regarding its function in determining the defendant's guilt" (People v Koziuk, 57 NY2d 784).

The court's instruction on felony murder was correct. The court specifically instructed the jury that, before it could find defendant guilty of felony murder, it must first find defendant guilty of arson. In its instruction on arson it emphasized the element of intent. Thus, the jury could not, as defendant contends, have inferred from the language, "it doesn't matter that the act which caused the death was unplanned and unintentional", that defendant was guilty of felony murder even if defendant

unintentionally set the fire. Defendant has taken the quoted language out of context. Read in connection with the next sentence, the court's meaning was clear: "In other words, even though they didn't plan to cause death and didn't do so intentionally, all the participants are guilty of felony murder as though each planned to cause death and each had done so intentionally." This correctly states the law (*see,* Penal Law §125.25[3]; People v Luscomb, 292 NY 390, 395-397).

The court properly refused defendant's request to charge the affirmative defense to felony murder (*see,* Penal Law §125.25[3]) because there was insufficient evidence for the jury to find by a preponderance of the evidence that the elements of the affirmative defense were established (*see,* People v Walker, 64 NY2d 741, *rearg dismissed,* 65 NY2d 924).

We agree with the suppression court that the police had sufficient reason to approach and make inquiries of defendant and his companion, that, after inquiry and as the result of further observation, the police had reasonable suspicion to detain them for further inquiry, and that the police finally obtained probable cause to make the arrest. We also agree that the statements made by defendant to the police were not the product of police questioning or its equivalent (*see,* People v Howard, 62 AD2d 179, 181-182, *affd* 47 NY2d 988).

We have reviewed the other contentions of defendant and we find them to be without merit. (Appeal from Judgment of Erie County Court, Wolfgang, J. - Murder, 2nd degree and other charges.) Present: Denman, J.P., Boomer, Pine, Davis, JJ.

APPENDIX "C"

Memorandum and Order of the County Court for the County of Erie, State of New York, Indictment No. 84-0458-001, entered March 19, 1985

STATE OF NEW YORK

COUNTY COURT—County of Erie

Indictment #84-0458-001

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

TIMOTHY REINIG,
CHARLES KELLER,

Defendants.

'85 Mar 19 P4:58
Filed
Erie County Clerk
Criminal Records

RICHARD J. ARCARA, ESQ.
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By: RICHARD J. BARNES, ESQ.
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MEMORANDUM AND ORDER

WOLFGANG, J.

An indictment has been filed against the defendants accusing them of Murder in the Second Degree, Arson in the Second Degree, Burglary in the First Degree and Petit Larceny. The defendants by way of an Omnibus motion have requested certain relief which includes both the suppression of physical evidence and suppression of certain statements allegedly made by them.

A full evidentiary hearing has been held on the motions brought by the defendants. Based upon the evidence adduced, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

On April 4, 1984, at approximately 5:30 A.M., Buffalo Police Officer Elijah Abram and his partner Officer John Eberhart were in the area of Sycamore and Sobieski Streets after having responded to an unrelated domestic call. The officers were approached by a citizen who indicated that he had just observed two males carrying a stereo in what the citizen described as a suspicious manner. The citizen pointed to the two individuals who had by that time walked further down Sobieski Street. Officer Abram observed the two individuals as he stood speaking to the complaining citizen. Officers Abram and Eberhart then drove their police vehicle toward the two defendants in order to investigate the situation. As the patrol vehicle approached the two individuals Officer Abram recognized one of them as being the defendant Timothy Reinig, an individual who had had prior involvement with burglary investigations. Officer Abram further noticed that Reinig, who had begun to walk away

from the other individual, was carrying a large blanket which appeared to be filled with various items. The other individual, later identified as Charles Keller stated to the officers "This is my stereo". Keller further indicated that both he and Reinig were coming from a party at his girl friends house; that all the items being carried belonged to him and that he was in the process of bringing them home from his girl friends house.

While Officer Abram was talking to Keller, he noticed a chain fall from underneath Keller's jacket. He asked Keller what it was. Keller responded that he did not know what it was. At the same time Officer Abram observed a bulge on the side of Keller's jacket. He asked him what the object was that was causing the bulge. Keller stated "I don't know. Reach in if you want to find out what it is, reach in yourself"! Abram then asked Keller to unzip his jacket. When he did so, Abram reached in and retrieved a wall clock with a long chain and a ladies purse. Officer Abram completed his precautionary pat down of Keller and then proceeded to pat down Reinig.

After retrieving the purse, the Officers asked Keller if he knew to whom the purse belonged. Keller said it belonged to his girl friend. Officer Eberhart opened the purse and found an identification card. The name given by Keller did not match the identification contained in the purse.

At approximately this point in time, a call came over the police radio indicating that there was a fire at 242 Sobieski Street. The Officers had not yet finished questioning Keller and Reinig. They placed the two individuals and the items they were carrying into the police car and proceeded up the street to the approximate location of the Fire. After determining that

the fire was indeed at 242 Sobieski and after having observed the identification in the purse indicating that the owner thereof resided at the same address, both defendant were formally placed under arrest and advised of their Miranda Rights.

Keller and Reinig acknowledged receiving their rights. Reinig indicated that he wished to speak to an attorney before any further questioning. Keller made no such request. Both men were removed from the car and again patted down—this time in a more thorough manner. A prescription bottle of medicine was found in Keller's coat pocket. The name and address on the prescription bottle was the same as the owner of the purse.

While the defendants were being handcuffed and returned to the police car, a fire investigator approached the Officers and advised them that a body had been discovered at the fire scene. Reinig then voluntarily stated to Officer Abram "I don't know the guy" referring to the co-defendant Keller. "I saw him on Sycamore carrying the stuff and he asked me to help him". Reinig then stated to the Officers: "Ask Abram, he'll tell you I don't do this type of stuff", "this ain't my stick Abram, you know me, I just do a few burglaries". "I don't know why this motherfucker got me in this, (referring to the co-defendant) if he lies on me I'm going to kill the boy".

Before the Officers and the two defendants proceeded from the fire scene to Central Booking, Buffalo Police Officer Jerome McIntee, who was familiar with defendant Reinig, entered the police car and engaged Reinig in conversation. After he exited the vehicle, the defendants were transported to the Homicide Bureau at Central Booking.

Upon entering the Homicide Office, both defendants were again advised of their rights. Defendant Timothy Reinig, having requested an attorney, was not questioned. Charles Keller, after acknowledging receipt of his rights, knowingly and voluntarily provided the police with a video-taped statement.

CONCLUSIONS OF LAW

In *Florida v. Royer,* 103 S.Ct. 1319, 75 L.Ed2d 229, the Supreme Court articulated the following criteria for judging the validity of investigative seizures on less than probable cause for the purpose of detention and/or interrogation. The Court stated as follows:

> "The predicate permitting seizures on suspicion short of probable cause in that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure."

The New York Courts have made further clarifications as to this State's standards with regard to "stop and frisk" situations. In *People v. LaPene,* 40 NY2d 210, the Court set forth four graduations of permissible intrusion, which police action would be justifiable as the precipitating and attendant factors increase. The minimal

intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. The next level as explained by the Court is the common-law right to inquire—activated by a founded suspicion that criminal activity is afoot. This level permits intrusion to the extent necessary to gain explanatory information. The third level would allow a forcible stop and detention where a police officer entertains a reasonable suspicion that the person being questioned has committed a felony. The final level allows an arrest based upon probable cause to believe that a crime has been committed.

In the instant matter, the facts and circumstances as the Court has found them to be, quickly rose from the lowest to the highest level as indicated above based upon the unsatisfactory and contradictory responses offered by the defendants and further based upon the linking of the purse to the fire call.

The actions by the police were justified and lawful under the facts and circumstances of the instant matter. The motion to suppress the physical evidence seized pursuant to the arrest of the defendants is therefore denied.

As concerns the statements sought to be introduced by the People, this Court holds that all of the statements of the defendant Charles Keller are admissible. Those statements made during the original confrontation between the defendants and the police were made in response to questioning by the police and are properly admissible as statements made during the initial phase of the investigation. The questions being asked of the defendants were asked in order to clarify the situation

being investigated (see *People v. Greer*, 42 NY2d 170; *People v. Huffman*, 41 NY2d 29; *People v. McMillan*, 112 Misc.2d 901). Reasonable inquiry when conducting the initial phases of an investigation are permissible (see *People v. Johnson*, 59 NY2d 1014). All other statements made by the defendant Charles Keller were the product of meaningful and rational acts of volition (*People v. Howard*, 27 AD2d 796). There was no physical intimidation, nor was psychological pressure exerted. The voluntariness of the statements has been established beyond a reasonable doubt (see *People v. Valerius*, 31 NY2d 51).

As concerns the statements of the defendant Timothy Reinig as indicated in the above findings of fact, this Court holds that, as stated in *People v. Lynes*, 49 NY2d 286, "... the trial judge must determine whether the defendant's statement can be said to have been triggered by police conduct which should reasonably have been anticipated to evoke a declaration from the defendant (see *People v. Howard*, 62 AD2d 178, 181-182, aff'd 47 NY2d 988)." In the instant matter, the statement in question was made spontaneously and was not the product of police interrogation or of police responses designed to elicit further responses by the defendant. At the time the statements in question were made, the defendant had requested an attorney and all questioning had ceased. The voluntariness and spontaneity of the statements has been established beyond a reasonable doubt.

Defendant Reining's motion to suppress such statements is therefore denied.

PENNY M. WOLFGANG
J.C.C.

Dated: Buffalo, New York
March 15, 1985

Granted
Mar 19 1985
(Illegible)
Court Clerk